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Supreme Court of the United States

OCTOBER TERM, 1932—No. [redacted] 9

CULLEN FUEL COMPANY, INC., owner of Deck Scow "CULLEN No. 32,"

Petitioner,

against

W. E. HEDGER, INC., bailee of cargo.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

HORACE L. CHEYNEY,
Counsel for Petitioner.

CORPORATE PRESS, INC., NEW YORK CITY

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SUPPLEMENTAL MEMORANDUM

The brief filed in support of the petition contains errors in two respects, which escaped attention in proof reading.

The quotation from the opinion of Mr. Justice HOLMES in *Capitol Transportation Company* v. *Cambria Steel Company,* 249 U. S. 334, on page 8 of the brief is erroneous.

The true citation is as follows:

> "We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go."

At the foot of page 6 of the brief, it is said that Judge WOOLSEY held that the boat as a fact was "seaworthy." This is erroneous and should read "unseaworthy."

HORACE L. CHEYNEY,
Counsel for Petitioner.

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Supreme Court of the United States

CULLEN FUEL COMPANY, INC., owner of Deck Scow "CULLEN NO. 32," *Petitioner*, against W. E. HEDGER, INC., bailee of cargo.	October Term, 1932. No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of Cullen Fuel Company, Inc., as owner of the deck scow *Cullen No. 32*, respectfully shows to this Court as follows:

This is a petition for a writ of certiorari to review a decision, in admiralty, of the United States Circuit Court of Appeals for the Second Circuit, which modified the decree of the United States District Court for the Southern District of New York.

The fundamental question involved in this petition is whether if a shipowner enters into a contract for carriage of goods his right to limit his liability for cargo losses is defeated because there is an implied warranty of the seaworthiness of the vessel, which is imputed to him or whether his right to limit depends solely upon the proof that the loss has occurred without his "privity or knowledge," as the statute provides, regardless of the implied warranty of seaworthiness.

The petition is prayed for because the decision of the Circuit Court of Appeals, denying the petitioner's right to limit liability for a cargo loss because of the implied war-

ranty of seaworthiness, is in direct conflict with the decisions upon the same point in other circuits; is in conflict with a recent decision of this Court and is also in conflict with the plain terms of the limited liability statute.

The Cullen Fuel Company, Inc., the petitioner, is engaged in the coal business in the City of New York, having a plant at 29th Street, East River.

It was the owner of the scow known as *Cullen No. 32.*

On August 11, 1925, the petitioner made an oral charter of its scow *No. 32,* to W. E. Hedger Co., Inc. The charter was made by telephone. Sweet, an employee of the petitioner, made the charter party on its behalf.

The charter of the scow was in the usual form which prevails in New York Harbor, whereby the scow was let to Hedger for an indefinite period and until the return of the boat to the petitioner, at a fixed daily rate of charter hire. The petitioner, as owner, furnished a man to go with the boat, commonly known as a bargee.

These charter parties have been current in New York Harbor for a number of years and have been repeatedly and uniformly held to amount to demises of the boats.

On August 11, 1925, the day the boat was chartered, Sweet, an employee of the petitioner, made an examination of it. He went down into the hold and made his examination with the aid of a flashlight and also examined the boat externally. His examination occupied about three-quarters of an hour. He testified the boat was then in sound, seaworthy condition.

On the night of the day of the charter, Hedger, the charterer, sent a tug to the plant of the petitioner at 29th Street, where the boat was then lying and that tug towed the scow to Roosevelt Street, East River.

Hedger had made a contract for the carriage of cargo of copper barytes on the steamship *Berk,* which was lying at Roosevelt Street, East River to Grasselli, N. J. The next day, August 12th, some of the cargo was discharged from

the steamship to the deck of the *No. 32*. This discharging was continued on the following day, until shortly before noon when the stevedores ceased discharging the cargo for some unknown reason. Within less than an hour thereafter, the boat capsized, dumped its cargo and rebounding, struck a wharf belonging to the Long Island Railroad Company on the opposite side of the slip, and also struck a carfloat belonging to the Long Island Railroad Company doing damage to both.

After certain suits were brought, the petitioner filed its petition in the District Court for the Southern District of New York, to limit its liability as to all claims arising out of said disaster.

Claims in said limitation proceeding were filed by W. E. Hedger Co., Inc., the charterer, as bailee of the cargo, and also by the Long Island Railroad Company, for damages to its wharf and carfloat.

The action came on for hearing before Honorable JOHN M. WOOLSEY, Judge of the District Court for the Southern District of New York, who after trial, delivered an oral opinion (R., p. 318) wherein he held that the Cullen Fuel Co., Inc., the petitioner, was liable for the accident above mentioned and denied its right to limit liability for the damages sustained by the claimants.

The trial judge held that at the time of the accident, the scow *Cullen No. 32* was unseaworthy either because it had water in it when delivered to be loaded alongside the *Berk* or that a leak existed in her starboard after corner or near it either at her stern or side. These findings of fact were purely conjectural as there was no evidence sustaining either of the findings above mentioned.

The Court held upon these conjectural findings that the scow was liable by reason of her unseaworthiness and that the petitioner, as owner of the scow, was not entitled to limit liability because the inspection made by Sweet of the scow before delivery to the charterer was insufficient and that

the petitioner should have made other and more frequent examinations of this scow.

An interlocutory decree was entered in accordance with said opinion. An appeal was taken from that decree by the petitioner to the Circuit Court of Appeals, which modified the decision of the District Court by holding that the petitioner was not liable for the claim of the Long Island Railroad Company, because it had overcome any presumption of negligence.

The Circuit Court of Appeals held that the owner was not entitled to limit liability and affirmed the decree of the Court below in that respect, but the basis of the decision of the Circuit Court of Appeals in denying the right to limit liability was entirely different from the basis of the decision of the Court below.

The decision in the District Court was in conflict with the authorities holding that the right to limit liability is defeated only where the accident occurs with the personal knowledge or privity of the owner; that in cases of corporations, the privity or knowledge must be that of one of the managing officers of the corporation; and that where a competent person is selected to look after a boat, the right of the owner to limit liability is not defeated by the negligence of the agent.

The only question which was argued in the Circuit Court of Appeals was whether the decree of the District Court below was in conflict with those authorities.

The Circuit Court of Appeals denied the right of petitioner to limit liability upon an entirely different ground, which was not raised before it in any way whatsoever and was not argued in that Court, either orally or in the briefs submitted.

The basis of the decision of the Circuit Court of Appeals denying the petitioner's right to limit is that the petitioner had made a personal contract, under which there was imputed to it an implied warranty of the seaworthiness of the

boat, in consequence of which its right to limit liability was denied. (The owner of the boat had made no personal contract with the owner of the cargo.)

The decision in the Circuit Court of Appeals in this respect is in conflict with the decision in other Circuits and is so admitted in its opinion.

Your petitioner presented a petition to the Circuit Court of Appeals asking for a rehearing so that the point upon which the Circuit Court of Appeals had rendered its opinion and which had never been argued before it, might be heard. The Circuit Court of Appeals denied this petition, notwithstanding its decision was in conflict with decisions in other circuits and the petitioner has never had its day in Court so far as concerns the ground upon which its petition of liability was denied.

CULLEN FUEL CO., INC.,
By H. L. CHEYNEY,
Counsel.

State of New York, }
County of New York, } ss.:

HORACE L. CHEYNEY, being duly affirmed, deposes and says:

That he is counsel for the petitioner, Cullen Fuel Co., Inc.; that he is familiar with the facts of this case; that he has read a copy of the transcript of record which accompanies this petition, being the transcript of record in the case at bar; that he has carefully examined the foregoing petition for a writ of certiorari; that the allegations and matters stated in said petition are true to the best of his knowledge, information and belief; and that in his opinion, the petition is well founded and the case is one in which the prayer of the petition should be granted by this Court.

HORACE L. CHEYNEY.

Affirmed to and subscribed before
me this day of March, 1933.

BRIEF IN SUPPORT OF PETITION

The Facts.

The Cullen Fuel Company, the petitioner, chartered its scow *No. 32* to W. E. Hedger & Co. The contract was an oral one made over the telephone, by Sweet, an employee of petitioner. It was in the usual form of charter existing in New York Harbor under which there was a demise of the boat to the charterer.

Under that charter, there was an implied warranty by the petitioner, as owner of the boat, to the charterer, of its seaworthiness at the time of its delivery under the charter but there was no continuing warranty of seaworthiness during the existence of the charter.

The Ice King, 261 Fed. 897;
O'Boyle v. *U. S.*, 47 Fed. (2) 585.

Hedger agreed to carry a cargo of copper barytes from the steamship *Berk* lying at Roosevelt Street, East River, N. Y. to Grasselli, N. J. Part of that cargo was loaded from the steamship by Hedger upon the petitioner's scow.

Hedger impliedly warranted the seaworthiness of the scow to the owner of the cargo, but there was no implied warranty of seaworthiness running from the petitioner, as owner of the boat, to the owner of the cargo.

The boat capsized with some cargo on board, which became a total loss.

The petitioner, as owner of the boat, filed its petition in the Southern District of New York to limit its liability for all claims arising out of this accident.

The Hedger Co. filed a claim in that proceeding, as bailee of the cargo, for the damage sustained by the cargo.

This petition came on for hearing before WOOLSEY, *J.* who held as a fact that the boat was seaworthy because of a leak

in or about the stern. That finding was purely conjectural as there was no evidence showing the existence of such a leak. The Trial Court also denied the right of the petitioner to limit liability upon the ground that an inspection made by Sweet, an employee of the petitioner, before the boat was delivered to the charterer was inadequate and incomplete and that the owner should have made other and more frequent examinations.

An appeal was taken to the Circuit Court of Appeals by the petitioner from the decree refusing its right to limit liability.

The question which was argued in that court in the briefs and orally was, if the examination of the boat made by Sweet, an employee of the petitioner was insufficient, whether the petitioner was not entitled to limit liability under those authorities which hold that the owner may limit liability if he selects a competent agent to look after the boat and to examine its condition and the disaster occurs without the owner's personal privity or knowledge.

The Circuit Court of Appeals by its opinion denied the right of the petitioner to limit liability, not upon the ground as stated by the District Court, but upon an entirely different ground which was not in any way argued before the Circuit Court of Appeals either orally or under the briefs presented.

The ground given in the opinion of the Circuit Court of Appeals for refusing the right of the petitioner to limit liability is that the petitioner impliedly warranted the seaworthiness of the boat and could not limit liability in face of that implied warranty.

It is conceded in the opinion of the Circuit Court of Appeals that its conclusion on that point is in conflict with the decisions in other circuits.

POINT I.

The decision of the Circuit Court of Appeals, holding that the petitioner could not limit liability because of the implied warranty of seaworthiness of the boat is in direct conflict with the decisions in other circuits, and it is so admitted in the opinion below.

There is no doubt of the conflict of authority on this point because it is conceded in the opinion in the present case (Record, p. 353).

In the case of *Pendleton* v. *Benner Line,* 246 U. S. 353, this Court held that the owner of a vessel could not limit liability as to cargo loss where he had made an express warranty of seaworthiness, but it has never held that the vessel owner may not limit liability where there is merely an implied warranty of seaworthiness imputed to him by law.

In *Capitol Transportation Company* v. *Cambria Steel Company,* 249 U. S. 334, this Court was asked to review the decision of the *Pendleton* case.

Mr. Justice HOLMES said as follows:

> "We very much appreciate the advantage that the Act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of the owners, as alleged by too literal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go."

The decision of the Circuit Court of Appeals for the Fourth Circuit in *Pocomoke Guano Company* v. *Eastern Transportation Company,* 285 Fed. 7, is admittedly in direct conflict with the decision of the Circuit Court of Appeals in the present case, as the Circuit Court of Appeals for the Fourth Circuit held in that case that the boat owner could limit his liability for cargo loss where there was only an implied warranty of seaworthiness.

A contrary view to that stated below is also declared in *Quinlan* v. *Pew,* 56 Fed. 111 in which the First Circuit held that an implied warranty did not affect the owner's right to limit liability.

The decisions in the Second Circuit upon this point are quite contradictory.

The Circuit Court of Appeals in the present case in declaring that the petitioner was not entitled to limit liability because of the implied warranty of seaworthiness, relied upon its previous decision in the case of *The Loyal,* 204 Fed. 930. In that case the Court was very much divided. NOYES, *J.* in delivering the prevailing opinion of the Circuit Court of Appeals, denied the right of the shipowner to limit liability because of the implied warranty of seaworthiness upon the ground that the owner could not limit liability where he had made a personal contract and relied largely upon the decision of the Sixth Circuit in *Great Lakes Towing Company* v. *Mills Transportation Company,* 155 Fed. 11.

The latter case really did not touch the question at issue because it involved a contract for the floating of a stranded ship, which was not successfully carried out.

WARD, *J.* concurred in the result but did not agree that the vessel owner was not entitled to limit liability because of a personal contract and expressed the opinion that the law was directly to the contrary and was as stated by Judge PUTNAM, in speaking for the Circuit Court of Appeals for the First Circuit in *Quinlan* v. *Pew,* 56 Fed. 111.

LACOMBE, *J.* seemed to be very much in doubt but said the question was a close one and he was inclined to concur with Judge NOYES and in view of the conflict of decisions in different circuits, expressed the hope that the question might be reviewed by this Court.

Prior to the decision in the *Loyal* case, *supra,* the Circuit Court of Appeals for the Second Circuit, had expressed an

entirely different opinion from that of Judge NOYES upon this question in the case of the *Republic*, 61 Fed. 109. In that case, WALLACE, *J.* in delivering the opinion of the Circuit Court of Appeals stated that the implied warranty of seaworthiness did not prevent the owner from limiting liability. That decision was not referred to in the opinions in the *Loyal* case.

After the decision in *The Loyal* case, the question of the effect of the implied warranty upon the right to limit liability came before the Circuit Court of Appeals for the Second Circuit in *The Ice King*, 261 Fed. 897.

In that case, there was a charter of a tug and the Court held that by reason of the implied warranty of seaworthiness of the tug, the owner was not prevented from limiting liability. In the course of the decision, the case of the *Loyal* was referred to and was not followed.

It has been generally assumed by the bar that the decision of the Circuit Court of Appeals in the *Ice King* case, *supra*, had in effect overruled its previous decisions in the *Loyal* case.

That view was not confined to the bar as the Circuit Court of Appeals for the Fourth Circuit, in the case of the *Pocomoke Guano Company* v. *Eastern Transportation Company, supra*, cited the *Ice King* case as an authority for the proposition that the implied warranty of seaworthiness did not prevent the owner from limiting liability for cargo losses.

It is desirable that the conflict of law between the different circuits upon this subject should be removed and that the law should be definitely declared by this Court.

Under this conflict of decisions, the vessel owners right to limit liability will depend upon his choice of a court in which to file his petition.

Suppose a vessel plying regularly between New York and Boston meets with disaster and a large loss occurs from damage to cargo.

The vessel owner might file his petition in New York or in Boston, as federal courts in both cities would have jurisdiction. If he should file his petition in New York, under the present decision, he could not limit liability because of the implied warranty of seaworthiness but if he should file his petition in Boston, the Court there no doubt would hold, under the decision of *Quinlan* v. *Pew, supra,* that the vessel owner could limit his liability against the same losses.

The same condition would ensue in case of a vessel running between Norfolk and New York. If the vessel owner should file his petition in New York, his right to limit liability would be denied under the present decision but if he filed his petition in Norfolk, he would be allowed to limit liability under the decision of the Fourth Circuit in *Pocomoke Guano Co.* v. *Eastern Transportation Co., supra.*

We have called attention to the fact that this question as to the right of the owner to limit liability for cargo losses by reason of the implied warranty of seaworthiness was not raised in the Circuit Court of Appeals below in any way whatsoever. It was not argued before the Court orally or in the briefs.

In view of the fact that this question was not argued before the Court in any way whatsoever, the petitioner made a motion for rehearing so that the questions could be fully and properly argued before the Court but that petition was denied and the parties have never had any hearing upon the subject whatsoever.

Whether this refusal of the Court below to hear argument upon this point amounts to a denial of due process of law is an interesting question which need not be definitely determined here.

Aside from other reasons advanced, it is submitted that a certiorari should be issued in this case, in view of the conflicting decisions, so that the parties may have an opportunity to be heard in support of their rights.

POINT II.

The decision of the Circuit Court of Appeals is in conflict with the recent decision of this Court in *Earl & Stoddard* v. *Ellermans Wilson Line, Ltd.*, decided December 12th, 1932.

That case involved the so-called "Fire Statute" set forth in Section 4282 of the Revised Statute, U. S. C. Title 46, Section 182.

In that case there was loss of cargo by fire.

It was held that the failure of an owner to exercise due diligence to discover unseaworthiness existing at the commencement of a voyage which was the cause of the fire was not "neglect of such owner" within the Fire Statute which exonerates a vessel owner from liability for loss of cargo by fire unless such fire is caused by the design or neglect of the owner.

Mr. Justice BRANDEIS in delivering the opinion of this Court stated as follows:

> "Those cases enunciate the rule that in every contract of affreightment there is, unless otherwise expressly stipulated, an implied warranty of seaworthiness at the commencement of the voyage. The warranty is absolute that the ship is seaworthy at that time and liability does not depend upon the knowledge or ignorance, the care or neglect of the ship owner or charterer. Obviously, those cases lend no support to the contention that breach of the implied warranty of seaworthiness constitutes neglect 'of the vessel owner under the Fire Statute.'"

The petitioner here claims the right to limit liability under Section 4283 of the Revised Statute (U. S. C. Tit. 46, Sec. 183). Both the Fire Statute as set forth in Section 4282 and the limited liability provision contained in Section 4283 are part of the same statute of March 3, 1851.

The Fire Statute provides that the owner or charterer shall not be liable for any damage to cargo on board a vessel unless such a fire is "caused by the design or neglect of such owner."

Section 4283 provides that the liability of the owner of any vessel for any loss of cargo occurring "without the privity or knowledge of such owner or owners" shall in no wise exceed the amount or value of the interest of the owner in the vessel.

The two sections of the Act must be given the same construction and the statements in the opinion in *Earl & Standard* v. *Ellermans Wilson Line, Ltd.*, are equally applicable to cases where there is a claim for limitation of liability under Section 4283 of the Revised Statutes.

POINT III.

The decision of the Circuit Court of Appeals is in direct conflict with the plain words of the statute.

Under the provisions of Section 4283 of the Revised Statute, the owner of any vessel may limit his liability for losses to cargo occurring without his "privity or knowledge."

The language of this section is clear and the only question in such cases is whether the loss has occurred without the privity or knowledge of the owner.

The Circuit Court of Appeals, however, has held that the right to limit liability in such cases does not depend upon whether the loss occurs without the privity or knowledge of the owner but whether he has made a personal contract for the carriage of the goods.

There is nothing in the statute which warrants such a conclusion.

The conflict which exists in the authorities on this point is due to the fact that the provisions of the Act of Section 4283 have been confused with the provisions of the Limited

Liability Act of June 26, 1884 (U. S. C. Title 46, 189). That statute provides that the individual liability of a shipowner shall be limited to the proportion of all debts and liabilities that his individual share of the vessel bears to the whole.

The Act of 1884 has been held by this Court to be a mere supplement to the Act of 1851.

It has been held in some cases, that under the Act of 1884, the shipowner cannot limit his liability under a personal contract. But that Act has no application whatsoever to claims for limitation of liability for cargo losses which are governed solely by the Act of 1884.

The decision of the Circuit Court of Appeals in *The Loyal*, 204 Fed. 930, which the Court below has followed in the present case is based largely upon the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Great Lakes Towing Company v. Mills Transportation Co.*, 155 Fed. 11.

In that case, the shipowner claimed limitation of liability against a contract made to pull off a vessel which was stranded. The effort was unsuccessful. The claim for limitation in that case could only have been made under provisions of the Act of 1884 and had absolutely nothing to do with the limitation as to cargo losses under the Act of 1851.

The Circuit Court of Appeals in the *Loyal* case failed to take this distinction into consideration and in fact, it gave no attention to the clear provisions of the Act of 1851, which are not referred to in the prevailing opinion.

In conclusion upon this point, we desire to call attention to the results which will follow the present decision.

Suppose the *Leviathan* departs from New York with some cargo on board shipped at New York, for which the owner has issued bills of lading and some cargo shipped from the West, for which the railroads have issued through bills of lading.

Under the present decision of the Circuit Court of Appeals, the owner of the *Leviathan* could limit liability against the loss of cargo shipped under the through railroad bills of lading but could not limit its liability for loss of cargo shipped at New York under the bills of lading signed by the owner.

Clearly, it was not contemplated that such an anomalous condition could exist.

If the provisions of Section 4283 of the Revised Statutes are properly construed the right to limit liability for cargo losses turns solely upon the question whether or not the loss occurs without the privity or knowledge of the owner, without any regard to the question whether or not such owner has made a personal contract for the transportation of the cargo, under which an implied warranty of the ship is imputed to him.

LASTLY.

It is respectfully submitted that a writ of certiorari should be issued to review the decision of the Circuit Court of Appeals for the Second Circuit in this case.

HORACE L. CHEYNEY,
Counsel for Petitioner.